Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

NO. 94-116

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SCHOOL CITY OF MISHAWAKA,
Petitioner
v.

FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The intellectual linchpin of Respondent's entire argument is based on the statement "[c]ertainly, 511 IAC 7-1-7, the predecessor to the subject regulation, 511 IAC 7-15-4, was not enacted pursuant to EDGAR [the Education Division General Administrative Regulations]" and the conclusion that it must therefore have been enacted under the due process provisions of 20 U.S.C. §1415(b). (Res.Br., 11) In response the Petitioner would show the Court that although it is true that 511 IAC 7-1-7 was not and could not have been promulgated under EDGAR, EDGAR also had predecessor regulations and 511 IAC 7-1-7 was promulgated under those predecessor regulations, not the due process provisions contained in what is now

20 U.S.C. §1415(b). Furthermore, 511 IAC 7-15-4 was clearly promulgated under EDGAR.

A. Contrary to Respondent's suggestion, the predecessor statute to 511 IAC 7-15-4, 511 IAC 7-1-7, was promulgated under the authority of EDGAR's predecessor regulations to provide a program specific complaint investigation procedure, not the due process hearing procedure mandated under 20 U.S.C. §1415(e), and 511 IAC 7-15-4 was promulgated under EDGAR.

In order to correct Respondent's misstatement regarding 511 IAC 7-15-4 and its predecessor 511 IAC 7-1-7, it is necessary to briefly review the history of federal involvement in the education of the disabled and the response of Indiana and other states to that federal involvement. In 1966 via Pub.L. 91-230, Congress added Title VI to the Elementary and Secondary Education Act of 1965, Pub.L. 89-10 ("ESEA")(20 U.S.C. 2701 et seq.). The purpose of Title VI was to create a Bureau of Education for the Handicapped to provide leadership to states in educating the handicapped. In 1968 Congress again amended the ESEA creating certain detailed procedural requirements to be imposed upon the states in exchange for the receipt of federal funds under the ESEA. These detailed requirements were the General Education Provisions Act ("GEPA"), Pub.L. 90-247, 81 Stat. 783, 20 U.S.C. §1232. These requirements applied to all federally funded educational programs including Title VI.

In 1970, Congress revisited the ESEA, repealing Title VI and creating a new act, the Education of the Handicapped Act, Pub.L. 91-230 ("EHA"). Under the EHA, any state that wished to receive

federal funding was required to adopt certain detailed procedural requirements including a due process hearing procedure for parents to use in challenging their children's educational placements. In Indiana these procedures were enacted as Rule S-1 on September 13, 1973. Section 2 of Rule S-1 enacted on September 13, 1973, contained a due process procedure which was available only to parents, guardians, surrogate parents and children. (Pet.Rep.App. 1) The due process hearing procedures contained in Section 2 of Rule S-1 are the predecessor regulations to 511 IAC 7-1-3(g) which is the predecessor to 511 IAC 7-15-5. Rule S-1 contained no complaint investigation procedure as none was required under the ESEA or the EHA. (Id.)

In 1975 Congress again revisited the issue of the education of the handicapped and passed the Education for All Handicapped Children Act, Pub.L. 94-142, as amended 20 U.S.C. §1400 et seq. ("EAHCA"). Pursuant to Congressional mandate, on August 23, 1977, the Office of Education, Department of Health Education and Welfare (hereinafter "HEW") promulgated final regulations intended to implement the requirements of the EAHCA and "to assure that the rights of handicapped children and their parents are protected." 42 Fed.Reg. 42474 (1977) As with its predecessor, the EAHCA also required, in exchange for the receipt of federal funds, the states to adopt detailed due process hearing rights available to parents, guardians, surrogate parents, and children. These provisions were contained in "**Subpart E-Procedural Safeguards**-Due Process Procedures for Parents and Children." 45 CFR §§121a.500-121a.5-14; 45 Fed.Reg. 42494-42496 (1977)[1] However, the administrative regulations enacted under the EAHCA departed from their predeces-

[1] These regulations are the predecessor to the current due process hearing procedures enacted by the United States Department of Education under the IDEA, 34 CFR §§300.500-300.515.

sors in that they also contained a new procedure, **"Subpart F-State Administration-**State Education Agency Responsibilities: General" which provided as follows:

> **"§121a.602 Adoption of complaint procedures.**
>
> (a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the require ments of this part.
>
> (b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:
>
> (1) Designate specific individuals within the agency who are responsible for implementing the requirements;
>
> (2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and
>
> (3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with §121a.194.
>
> (20 U.S.C. 1412(6))"

42 Fed.Reg. 42501 (1977).

In accordance with these regulations, and in order to continue to qualify to receive federal funds, on August 25, 1978, Indiana modified Rule S-1 and recodified it at 511 IAC 7-1-1. The due process hearing procedures for parents, guardians, surrogate parents, and children mandated under 45 CFR §§121a.500-121a.514 were incorporated into the existing due process procedures and placed at

511 IAC 7-1-3(g). (Pet.Rep.App. 14-15) These regulations are the predecessor to the current due process hearing procedures found at 511 IAC 7-15-5. (Pet.App. 76-80) However, in addition to the modification of the due process hearing procedures, on August 25, 1978, pursuant to 45 CFR §121a.602, Indiana also enacted a process for the investigation of complaints by "public agencies, or private individuals, or organizations." This regulation, 511 IAC 7-1-7, is the predecessor to 511 IAC 7-15-4. (Res.Br. 10-11; Res.App. 1-2)

On May 4, 1979, in what was dubbed as "Operation Common Sense" HEW proposed the Education Division General Administrative Regulations ("EDGAR"). 44 Fed.Reg. 26297-26338 (1979) The newly proposed EDGAR regulations were "developed from existing general regulations, program regulations, other policy documents, and in some cases new legislation." 44 Fed.Reg. 26299 (1979)[2] §§100b.780-100b.782 of the proposed regulations governed complaint investigation procedures and incorporated the complaint procedures previously found in the EAHCA regulations, 45 CFR §121a.602. Following a comment and revision period, the final EDGAR regulations were adopted on April 3, 1980. 45 Fed.Reg. 22494 (1980) With the enactment of the comprehensive EDGAR procedures, the program specific complaint investigation procedure under the EAHCA, 45 CFR §121a.602, was repealed. Because EDGAR contained no requirement that individual states also repeal their program specific complaint investigation procedures as HEW had done, for clarity and consistency Indiana (and most other states) retained their program specific complaint investigation procedures, and the federal regulatory authority for those complaint investigation procedures simply shifted from the repealed program specific

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[2] HEW cited to GEPA as the source of its statutory authority for the EDGAR regulations. 44 Fed.Reg. 26298 (1979).

regulation (45 CFR §121a.602) to the substantially similar but non-program specific EDGAR regulations. (45 CFR §100b.780-783)[3]

As noted above, a part of the federal rulemaking process involves the solicitation of comments by the public. In connection with the promulgation of EDGAR, the following comment and response appeared:

> **"Sec. 100b.781 Minimum Complaint Procedures**
> Comment. One commenter [sic] suggested that this section not apply to due process procedures for students.
> Response. No change has been made. The minimum procedures in Sec. 100b.781 relate only to those complaints identified in Sec. 100b.780."

45 Fed.Reg. 22574-22575 (1980). Thus HEW made it clear that it believed that its regulation did not provide, as Respondent claims, the due process procedure in 20 U.S.C. §1415(e), but rather was intended to provide a separate complaint investigation process independent of the due process requirements.

The wisdom of Indiana and many other states in deciding to retain program specific complaint investigation procedures in their special education regulations became apparent in 1988 when HEW proposed deleting the EDGAR complaint investigation procedures and reverting back to program specific complaint investigation procedures:

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[3] In late 1980 the EDGAR regulations were redesignated from 45 CFR §100b to 34 CFR §76. 45 Fed.Reg. 77368 (1980).

"Sections 76.780-76-782-The Secretary proposes to remove these sections because they either do not apply to or have not been used under most programs of the Department. Most of the provisions were derived from the regulations for the State-administered program under Part B of the Education of the Handicapped Act (EHA). Those provisions of the State complaint procedure that were derived from the regulations under the EHA are proposed to transfer back to that program, which has shown the greatest need for the complaint procedure."

53 Fed.Reg. 31584 (1988).

In 1992 HEW followed through and removed the general complaint investigation procedure from EDGAR and placed it back into what had by then become the IDEA as a program specific complaint investigation procedure. The reasoning for this decision was given as follows:

"In the NPRM, the Secretary proposed to remove the State complaint procedures from EDGAR and to transfer those procedures to Part B of the Individuals with Disabilities Education Act (IDEA) (formerly, the Education of the Handicapped Act). In doing so, the Secretary noted that the complaint procedures had originated under the Part B program and that the procedures had not been used under most programs of the Department. Four of the comments received by the Department asked that the State complaint procedures be kept in EDGAR. The commenters believed that the reason that the State-administered programs other than Part B of IDEA did not use the procedures was because there was a lack of awareness about the procedures under those programs. However, the Secretary believes that

> complaint procedures are most appropriate for the following programs that focus on the special needs of individuals or are designed to assist disadvantaged children: • Part B of IDEA (34 CFR part 300) ... Thus, the Secretary has decided to remove State complaint procedures from EDGAR. The four Chapter 1 programs and the part H program listed above already include the complaint procedures contained in EDGAR. This final rulemaking document adds those procedures to the part B program."

57 Fed.Reg. 30328 (1992).

As a consequence of this, on July 8, 1992, the general complaint investigation procedures in EDGAR (34 CFR §§76.780-76.782) were repealed and once again became program specific, being again placed in Part B of the IDEA regulations at 34 CFR §§300.660-300.662. (Pet.App. 68-69) During this same period of time Indiana was also revising its own Rule S-1. As noted in Respondent's Brief, Rule S-1 was repealed effective January 8, 1992, and was replaced with a new set of special education regulations, 511 IAC 7-15-1 et seq. (Res.Br. 11; Res.App. 3, 7) As part of these amendments, given the pendency of the proposed rulemaking by HEW, Indiana chose to retain its program specific complaint investigation procedures and thus 511 IAC 7-1-7 was recodified at 511 IAC 7-15-4 with the purpose, as noted by HEW in its proposed rulemaking, of ensuring full implementation of Part B of the IDEA. 15 Indiana Register 505 (Res.App. 3) However, since the recodification took place while EDGAR was still in effect, 511 IAC 7-15-4 was implemented under EDGAR, not IDEA. However, following the repeal of the EDGAR general complaint investigation procedures on July 8, 1992, in favor of program specific complaint investigation procedures, the authority for 511 IAC 7-15-4 shifted back to the IDEA. This is simply the reverse of

what had happened to its predecessor 511 IAC 7-1-7 when EDGAR first went into effect in 1980.

The simple fact is, contrary to Respondent's assertion, since 1973 Indiana, like all other states, in exchange for receiving federal funds to assist in the education of the disabled, has had a due process hearing procedure open and available for use by parents, guardians, surrogate parents and children as mandated by 20 U.S.C. §1415(b) and (e) and its predecessor statutes and regulations. This due process hearing procedure first appeared in Indiana in 1973 in Rule S-1 (Pet.Rep.App. 1), then in 1978 became 511 IAC 7-1-3(g) (Pet.Rep.App. 14-15), and eventually in 1992 became 511 IAC 7-15-5. (Pet.App. 76-80) In addition to this due process hearing procedure, since 1978, Indiana, like all other states, has also had a separate unrelated program specific complaint investigation procedure open to any organization or individual as mandated by the 1977 EAHCA regulations (45 CFR §121a.602). This complaint investigation procedure as first promulgated at 511 IAC 7-1-7 passed in 1978, then in 1992 became 511 IAC 7-15-4 under the EDGAR regulations. Because the differing legislative and administrative histories clearly show that 511 IAC 7-15-4 and its predecessors were never promulgated or utilized to fulfill the role of the due process hearing procedures required under 20 U.S.C. §1415(b) and (e), the linchpin of Respondent's entire argument fails.

CONCLUSION

Because the predecessor regulation to 511 IAC 7-15-4, 511 IAC 7-1-7, was promulgated under the authority of EDGAR's predecessor regulations to provide a program specific complaint investigation procedure, not the due process hearing procedure

mandated under 20 U.S.C. §1415(b)and (c)[4], the issue before this Court is not one unique to Indiana regulatory law. Rather, the issues before this Court are those of national import noted in the Petition, i.e., whether the Seventh Circuit erred in utilizing a program specific complaint investigation regulation to grant the Respondent standing to utilize the due process hearing provisions of 20 U.S.C. § 1415(b) and (e). This issue, as noted in the Petition and the Amici briefs, is one of national import affecting all states with similar regulations, and one in which there is a clear conflict in the circuits warranting review by this Court.

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[4] The fact that Indiana's program specific complaint investigation procedure grants a right of judicial review is irrelevant to this case as the Respondent filed suit in federal court and Indiana's regulation cannot confer jurisdiction on the federal courts. Rather the Respondent could have (and had they read the regulation carefully should have) filed the request for administrative review in an Indiana court of competent jurisdiction under the Indiana Administrative Procedures Act, I.C. 4-21.5-5-1 et seq., not in federal court under the IDEA.

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Rule S-1: Section 2

(20-1-6-3)-2. **Program specifications.**--Programs to be approved under the provisions of these statutes [Rules (20-1-6-3)-1--(20-1-6-3)-24] shall provide instruction for pupils between six [6] and eighteen [18] years of age inclusively, and may provide programs for pupils between the ages of three [3] and six [6], and eighteen [18] and twenty-one [21], and who are not in attendance in any of the residential schools of the state. Special education programs for deaf students may be approved for children as young as six [6] months of age.

The determination of the proper educational program for a student is the responsibility of the school superintendent. Specialists from the school staff, consultants or parents shall assist in providing and interpreting appropriate information. After determination of proper educational program for a student is made by the school superintendent with proper advice from specialists and consultants of the school staff, written permission of the parent or guardian must be obtained before the child is officially assigned to a special education class.

To be fully effective, educational programming for students who may benefit from special education placement requires a team effort involving parents, teachers, school administrators, and specialists. Teamwork of this kind rests upon mutual trust and frequent communication; therefore, it shall be the responsibility of the superintendent of the local school corporation to make certain that the parents (or legal guardian) of any pupil referred for any specific, individual tests which are intended to determine cause, extent or possible remediation of suspected learning difficulty are fully

informed of the referral and the reasons for the referral before any such tests are administered. Such information must be presented to the parent (or legal guardian) in a personal interview by a person designated by the superintendent of the school corporation of which the child is a resident. The written consent of the parent or legal guardian must be obtained before any such tests are administered. If a personal interview for the purpose of informing the parent or legal guardian of the referral is refused by the parent or legal guardian, the superintendent or his representative may then inform the parent or legal guardian by mail.

Preliminary group screening tests concerning physical health or mental ability which are administered to all students do not require a personal interview.

No child shall be excluded from or transferred out of a regular public school assignment unless such child is provided (a) free and adequate alternative educational service suited to the child's needs and (b) written notice, an opportunity for a constitutionally adequate prior hearing and periodic review of the child's status and the adequacy of any educational alternative.

The superintendent or his designee of the school attended by the child shall convoke a case conference committee to consider the appropriate educational placement for that child. The case conference committee shall be composed of appropriate school administrators, specialists, special education teachers, and/or regular education teachers who may have knowledge of the child and the parents of the child being considered for special education programs. unless the parents choose not to participate.

The case conference committee coordinator shall make arrangements for: (a). the assembly of all relevant data and reports concerning the child and, (b). the administration of further tests and evaluations to aid in assessing the educational needs of the child.

Provided That: No pupil shall be compelled to submit to medical examination whose parent objects, in writing, to such examination.

Within sixty [60] days of the initial request or recommendation, the full committee must meet, having been provided with all relevant reports and data prior to said meeting, and recommend an educational program for the child. A report embodying that recommendation and the reasons therefor shall be prepared by the coordinator and shall be forwarded to the local school superintendent or his designee within twenty [20] days of the case conference meeting. The superintendent shall provide for the special educational needs of the child by way of an educational placement as close to the norm as possible.

The superintendent shall prepare a report which includes both the placement proposed and a statement of reasons therefor, a copy of which shall be sent to the child's parents. Accompanying said report to the child's parents there shall be a notice of the right to a hearing before a hearing officer if there is an objection to the placement. Whenever the superintendent proposes to take action regarding a child's special education placement, denial of placement, or transfer, the child's parent or guardian shall be informed by written notice of said proposal. If the parent or guardian opposes the proposal, he shall make a written demand for a hearing. Such hearing must be conducted within twenty to forty-five [20-45] days after the demand. Pending the outcome of the hearing, the child must be provided with

interim educational services. In carrying out the above, the following procedures shall be followed.

(i). If the child is not currently provided with a free educational program, he shall be provided with the program deemed suitable by the local school system staff pending a decision by the hearing officer pursuant to this procedure. If the child is already being provided with a free educational program, changes to which the parents or guardians object shall not be made pending the hearing decision.

(ii). Notice required hereinbefore shall be given in writing by registered mail to the parent or guardian of the child.

(iii). Such notice shall:

(a). describe the proposed action in detail,

(b). clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such proposed action is based;

(c). describe any alternative educational opportunities available on a permanent or temporary basis;

(d). inform the parent or guardian of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(e). inform the parent or guardian that the child may be tested for an independent medical, psychological and educational evaluation and specify the name, address and telephone number of an appropriate local diagnostic center;

(f). inform the parent or guardian of any organizations providing assistance with respect to placement questions;

(g) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine and copy the child's school records at any time during regular office hours, including any tests or reports upon which the proposed action may be based to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action is based.

(iv). The hearing shall be at a time and place reasonably convenient to such parent or guardian, and shall be scheduled not sooner than twenty [20] days nor later than forty-five [45] days after the receipt of a request from the parent or guardian.

(v). The hearing shall be closed to the public unless the parent or guardian requests an open hearing.

(vi). The child and his parent or guardian are guaranteed the right to a lawyer or other representative of their own choosing. If they are unable, through financial inability, to retain counsel, the superintendent shall advise the child's parent or guardian of available voluntary legal assistance.

(vii). The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

(viii). The local school corporation shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.

(ix). A tape recording or other verbatim record of the hearing shall be made, and upon request shall be transcribed and made available to the parent or guardian or his representative.

(x). At a reasonable time prior to the hearing (and at any other time during regular business hours), the parent or guardian, or his counsel, shall be given access to all records of the public school system and any of its agents or employees pertaining to the child, including any tests or reports upon which the proposed action may be based.

(xi). The independent hearing officer shall be designated by the state superintendent of public instruction and shall not be an officer, employee or agent of the local school system or the local board of education.

(xii). Costs pertaining to the hearing officer shall be paid by the local school corporation.

(xiii). The parent or guardian, or his representative, shall have the right to compel the attendance of, to confront, and to cross-examine any witness testifying for the public school system or any public employee who may have evidence upon which the proposed action may be based.

(xiv). The parent or guardian, or his representative, shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(xv). Within thirty [30] days after the hearing, the hearing officer shall render a decision in writing. Such decision shall include findings of fact and conclusions of law and shall be sent by registered mail to the parent or guardian and his counsel.

(xvi). Appeals of any kind in reference to Rule S-1 [(20-1-6-3)-1 -- (20-1-6-3)-24] may be made to the state board for special education appeals after procedures set out in this document are followed.

[State Bd. of Educ., Comm. on Gen. Educ., Rule S-1, §2, adopted Sept. 6, 1973, filed Sept. 13, 1973.]

511 IAC 7-1-3 Identification and placement; testing; case conference committee

Authority: IC 20-1-1-6; IC 20-1-6-2
Affected: IC 20-1-6; IC 20-8.1-5

Sec. 3. Programs to be approved under the provision of 510 IAC 7-1 [511 IAC 7-1] shall provide instruction for students as stated in IC 20-1-6-1.

(a) Protection of rights. The Indiana department of public instruction will insure that the rights of a student are protected by:

(1) Maintaining a registry of persons, excluding employees of public agencies involved in the education or care of the student, who are willing to be duly appointed to act as surrogate parent in connection with a child's educational placement and program when the child's parent is unknown, unavailable, or when the child is a ward of the state. These persons' names are to be transmitted upon the request of courts making appointments in accordance with Indiana law;

(2) Entering into memoranda of understanding with public agencies and departments to the extent necessary to assign duties with respect to:

(A) locating apparently unknown or unavailable parent; and

(B) ascertaining the need for and initiating appropriate legal proceedings to obtain the appointment of a parent;

(3) Providing training to persons appointed to act as surrogate parent concerning applicable education laws and rules so that such persons may obtain the knowledge and skills necessary for adequate representation of children; and

(4) Assuring that local school systems will insure that the rights of a child are protected by:

(A) exercising due diligence in locating the apparently unknown or unavailable parent, utilizing the assistance of other public agencies, as may be necessary and in accordance with any memoranda of understanding entered into by the state department of public instruction;

(B) appointing a surrogate parent for any child in the legal custody of, or who is a ward of, a child-placing agency licensed by the state department of public welfare or a department of public welfare; and

(C) providing notices and information in accordance with 510 IAC 7-1 [511 IAC 7-1] and, in particular, providing such information about the child to the surrogate parent as may be necessary to enable him/her to represent the child's interests adequately.

(b) Referral. Referral of any child for an educational evaluation may be generated by the child, parent, teacher(s), school administrator(s) and/or specialist(s). Such a referral may be initiated to determine cause, extent, or possible remediation of suspected learning difficulties or handicapping conditions. Such a referral shall proceed in a manner consistent with the school's referral process. The referral shall be dated as to the time of its initiation, and shall include documentation of any attempts to remediate the learning difficulty of the child.

(c) Permission for testing. It shall be the responsibility of the superintendent of the school to make certain that the parent of any child referred for any educational evaluation is fully informed of the referral and the reasons for the referral before any individual tests included in the educational evaluation are administered. Such information must be presented to the parent in a personal interview by a person designated by the superintendent of the school of which

the child is a resident. The personal interview will be accompanied by written notice which shall:

(1) describe the referral, reasons for the referral, proposed assessment techniques, a timetable for evaluation and the case conference commiteee [sic.] meeting;

(2) describe any options considered and the reasons why those options were rejected;

(3) describe any alternative educational opportunities available on a permanent or temporary basis;

(4) describe any other factors relevant to the proposed evaluation;

(5) Inform the parent of the opportunity to meet with the superintendent or his/her designee and/or the local board of education to attempt to resolve any objections;

(6) inform the parent of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(7) inform the parent that the parent may obtain an indepen dent educational evaluation;

(8) inform the parent of any organizations providing assistance with respect to evaluation questions;

(9) inform the parent of the right to be represented at the hearing by legal counsel; to present evidence, including expert medical, psychological, and educational testimony; and to confront, cross-examine, and compel the attendance of witnesses who may have evidence upon which the proposed action is I based;

(10) inform the parent of the right to examine and copy the child's school records at any time during regular office hour~, including all tests and reports with respect to identification, evaluation, and educational placement, and provision of a free appropriate public education;

(11) inform the parent of the right to have access at the local level to all federal and state laws and rules pertaining to special education; and

(12) inform the parent of all of the procedural safeguards available regarding protection in evaluation procedures, least restrictive environment, confidentiality of information, and all other due process procedures.

Written notice and personal interview shall be in the parents' native language or other mode of communication. The written consent of the parent must be obtained before any such tests are administered. If a personal interview for the purpose of informing the parent of the referral is refused by the parent, or in the case of a speech-language evaluation, the superintendent or his/her designee shall then inform the parent by mail.

(d) Case conference committee and coordinator. The superintendent of the school attended by the child or his/her designee shall appoint a case conference committee and coordinator when written parent consent for individual testing has been obtained. The case conference committee coordinator shall make arrangements for:

(1) the organization and scheduling of the case conference committee;

(2) consulting with the parent regarding the appointment to the case conference committee of any individual(s) desired by the parent;

(3) the administration of tests and evaluations to aid in assessing the educational needs of the child; and

(4) the assembly of all relevant data and reports concerning the child.

(e) Educational evaluation. The evaluation of the child to aid in assessing his/her educational needs and the assembly of all relevant data and reports concerning the child shall be conducted in such a manner that the following safeguards are observed:

(1) tests and other evaluation materials are provided and conducted in the child's native language or other mode of communication;

(2) tests and other evaluation materials have been validated for the specific purpose for which they are used;

(3) tests and other evaluation materials are administered by appropriately licensed personnel in conformance with the instructions provided by the producer;

(4) tests and other evaluation materials shall include such materials designed to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(5) tests and other evaluation materials which are administered to a child with impaired sensory, manual or speaking skills must be capable of yielding results which accurately reflect the child's aptitude or achievement level or whatever other factors the materials purport to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the materials purport to measure);

(6) no single procedure is used as the sole criterion for determining an appropriate educational program for a child;

(7) the educational evaluation is made by a multidisciplinary team or group of persons, including at least one (1) teacher or other specialist with knowledge in the area of suspected disability; and

(8) the child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

In interpreting evaluation data and in making placement decisions, the case conference committee shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. Information from all these sources shall be documented and considered.

(f) Case conference committee meeting. The parent shall be given adequate notice, in his/her native language, of the date, time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the case conference committee, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants and notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing; and

(3) a listing of the collected data to be discussed.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. Within forty (40) school days of the initiation of the referral, the full committee must meet. If the child's parent cannot attend, the school shall use other methods to insure parental participation, including individual or conference telephone calls. Having been provided with all relevant reports and data at the

meeting, the committee will interpret the evaluation data and results, will determine appropriate placement options which provide the least restrictive environment for the child, and will determine necessary related services. A report embodying the individualized education program, a description of each evaluation procedure, test, record, or report used as a basis for the program, dissenting opinions, if any, and appropriate placement options shall be prepared by the case conference coordinator. This report shall be forwarded to the school superintendent or his/her designee within ten (10) school days of the case conference committee meeting. The determination of the proper educational program for a child is the responsibility of the superintendent or his/her designee. Utilizing the case conference committee's report, the superintendent or his/her designee shall provide for the special educational needs of the child through a determination of available resources and those additional resources which must be established for appropriate individual programming. Within ten (10) school days of the superintendent's receipt of the case conference committee's report, written notice of the superintendent's proposal shall be presented to the parent. Such notice shall be written in common, understandable language and in the parent's native language or other mode of communication. Accompanying such notice to the child's parent, there shall be written notice which shall:

(1) include a description of all evaluation procedures, tests, records, or reports used as a basis for the program, dissenting opinions, if any, and a placement recommendation.

(2) explain the reasons for the placement recommendation including a description of any options considered and the reasons why those options were rejected;

(3) describe any alternative educational opportunities available on a permanent or temporary basis:

(4) describe any other factors relevant to the proposed placement;

(5) inform the parent of the opportunity to meet with the superintendent or his/her designee and/or the local board of education to attempt to resolve any objections;

(6) inform the parent of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(7) inform the parent that the parent may obtain an indepen dent educational evaluation;

(8) inform the parent of any organizations providing assistance with respect to placement questions;

(9) inform the parent of the right to be represented at the hearing by legal counsel; to present evidence, including expert medical, psychological, and educational testimony; and to confront, cross-examine, and compel the attendance of witnesses who may have evidence upon which the proposed action is based;

(10) inform the parent of the right to examine and copy the child's school records at any time during regular office hours, including all tests and reports with respect to identification, evaluation, and educational placement, and provision of a free appropriate public education;

(11) inform the parent of the right to have access at the local level to all federal and state laws and rules pertaining to special education; and

(12) inform the parent of all the procedural safeguards available regarding protection in evaluation procedures, least restrictive environment, confidentiality of information, and all other due process procedures.

Whenever the superintendent or his/her designee proposes or refuses to take action regarding initiation, change, or denial of identification, evaluation or educational placement of the child or the provision of a free appropriate public education for the child, the child's parent

shall be informed by written notice in his/her native language of such proposal or refusal. The written notice shall include the information embodied in subdivisions (f)(1) to (f)(12). The written consent of the parent must be obtained before action is taken regarding a child's special education placement or transfer. If the parent's written consent is obtained, the proposed placement must be implemented within twenty (20) school days of the date of the notice by the superintendent or his/her designee. Placement shall be made upon receipt of the parent's written consent. If the proposed placement date falls within the last twenty (20) school days of the spring school semester, placement may be made on the first day of the following school semester.

(g) Hearing procedures. The parent or school may initiate a hearing in regard to the initiation, change, or denial of identification, evaluation or educational placement of the child or the provision of a free appropriate public education for the child. The request for a hearing and for the appointment of an independent hearing officer:

(1) shall be in writing;

(2) shall be made of and filed with the local superintendent, with a copy of the written request simultaneously filed with the state superintendent of public instruction; and

(3) shall specifically set forth the reasons for the request.

Such hearings must be conducted within twenty (20) school days after the request, and at a time and place reasonably convenient to the parent. The hearing officer may grant specific extensions of time beyond the twenty (20) school days at the request of either party. Upon receipt of such notice, the state superintendent of public instruction shall designate the independent hearing officer in writing, by letter of appointment, providing a copy of same to the parent and the school corporation. The letter of appointment shall include a copy of the written request for a hearing and shall contain such instruction, as deemed necessary or applicable, as to the scope of the

requested hearing and the hearing officer's jurisdiction relative to the conducting of the hearing.

The school shall bear all costs pertaining to the hearing, including the transcription, hearing officer's fee and expenses. The parent involved in a hearing shall be given the right to have the child who is the subject of the hearing present, and/or open the hearing to the public.

During the pendency of any administrative or judicial proceeding regarding a complaint, unless the department of public instruction or the school and the parent of the child agree otherwise, the child involved in the complaint shall remain in his/her present educational placement. The present educational placement of the child shall include normal grade advancement if the proceedings extend beyond the end of a school year. If the complaint involves and [sic.] application for initial admission to public school, the child, with the consent of the parent, shall be placed in the public school program until the completion of the proceedings.

The child and the parent are guaranteed the right to legal counsel and/or other representation of their own choosing. The school shall inform the parent of any free or low-cost legal services available in the area if the parent requests the information, or if the parent or school initiates a hearing. The decision of the hearing officer shall be based solely upon the evidence presented at the hearing. The school shall bear the burden of proof as to all facts pertaining to the appropriateness of any placement, denial of placement, or transfer.

A tape recording or other verbatim record of the hearing shall be made and transcribed, and, upon request, shall be made available to the parent or the parent's representative, at the school's ex-

pense. At a reasonable time prior to the hearing, during school office hours, the parent or the parent's counsel shall be given access to all records of the school and any of its agents or employees, pertaining to the child, including all tests and reports upon which the proposed action may be based. The parent or parent's representative and the school shall have the right to compel the attendance of, to confront, and to cross-examine any witness who may have evidence upon which the proposed action may be based. The parent or the parent's representative and the school shall have the right to present evidence and testimony, including expert medical, psychological, or educational testimony. Introduction of any evidence at the hearing that has not been disclosed to both parties at least five (5) days before the hearing is prohibited.

Within fifteen (15) school days following the hearing, the hearing officer shall render a written decision in the matter, including findings of fact and conclusions of law which will be binding on all paries. The hearing officer shall file the original of his findings, conclusions, and decision, along with the record in the case, with the board of special education appeals and shall cause fl copy of his findings, conclusions, and decision to be served upon each of the parties. The filing of the hearing officer's findings, conclusions, and decision along with the record in the case with the board of appeals shall operate to automatically transfer the case to the board of appeals. A copy of the hearing officer's findings, conclusions, and decision, with personally identifiable information deleted, shall be sent to the state advisory council on the education of handicapped children.

The dated written decision of the hearing officer shall contain a notice of the right to seek I review of the decision.

The dated written decision shall be final and implemented within twenty (20) school days following the date of the decision unless review is sought under subsection (h).

(h) Appeals.

(1) Board of Special Education Appeals. The state superintendent of public instruction shall appoint, upon confirmation by the commission on general education, a three (3) member panel which shall constitute the board of special education appeals. The members of the board shall be appointed for a three (3) year term. However the initial appointments shall be made in the following manner: one (1) member for one (1) year, one (1) member for two (2) years, and one (1) member for three (3) years, so that at no future time will all board members be simultaneously appointed. It shall be the duty of the board of appeals to conduct all appeals of special education hearings and to submit a yearly report to the commission on general education regarding problems, concerns and recommendations for special education.

(2) Contents of Record in Case--Definition. The transcript of testimony adduced and exhibits admitted before the hearing officer, together with the notice of hearing, all pleadings, exceptions, motions, requests, and papers filed, the hearing officer's findings, conclusions, and decision shall constitute the record in the case as transferred to the board of appeals.

(3) Petition for Review. Within twenty (20) school days (or such further period as the chairman may allow) from the date of filling [sic.1 with the board of appeals of the hearing officer's findings, conclusions, and dated decision, any party to the proceeding before the hearing officer may file a petition for review of the hearing officer's findings, conclusions, and dated decision, or to any other part of the record or proceedings with the board of appeals. The filing and

pendency of a petition for review shall operate to stay the effectiveness [sic.] of the decision of the hearing officer unless otherwise ordered by the board of appeals.

(4) Form of Petition for Review. The petition for review shall be in writing, shall be filed with the board of appeals, with a copy simultaneously filed with the opposing party, and shall specifically set forth the reasons for the objection of the party to the written decision of the hearing officer. The petition for review shall identify those portions of the hearing officer's findings, conclusions, and dated decision to which exceptions are taken.

(5) Reply to Petition for Review. Within ten (10) school days (or such further period as the chairman may allow) from the date on which the petition for review is filed with the board of appeals, any party to the proceeding before the hearing officer may file a reply to the petition for review. The reply to petition for review shall be in writing, shall be filed with the board of appeals, with a copy simultaneously filed with the opposing party, and shall specifically set forth the party's reply to the reasons for the objection of the opposing party to the written decision of the hearing officer.

(6) Dismissal of Petition--Waiver--Matters not Raised in the Petition for Review. Any petition for review failing to comply with requirements contained herein may be dismissed, in whole or in part, at the board of appeals' discretion. Any petition for review to any ruling, recommendation, finding, or conclusion of the hearing officer which is not specifically argued within such petition, exceptions, shall be deemed to have been waived, unless otherwise ordered by the board of appeals. Any matters not raised in the petition for review may not be included in any brief in support of the petition and exceptions, and may not be argued before the board of appeals. Any brief or reply not timely filed as

required herein may be disregarded and stricken from the record, at the board of appeals' discretion.

(7) Decision of the Board of Appeals. Within twenty (20) school days (or such further period as the chairman may allow at the request of a party for an extension of time) from the date on which the petition for review is filed with the board of appeals, the board of appeals shall conduct an impartial review of the hearing conducted by the hearing officer upon the record as a whole, shall insure that the procedures at the hearing were consistent with the require ments of due process, and the board of appeals shall:

(A) decide the matter upon the record without oral argument;

(B) decide the matter upon the record after oral argument;

(C) remand the matter to the hearing officer with instructions to reopen the record and receive further evidence; or

(D) make any other appropriate disposition of the matter.

At its discretion, the board of appeals may designate a review panel or review officer to conduct the impartial review of the hearing record and to prepare a written recommendation (in the form of findings of fact, conclusions of law, and a final order) for the board of appeals' final decision. The final decision of the board of appeals shall consist of the board of appeals' findings of fact, conclusions of law, and final order in the matter. In the event no timely and proper petition for review is filed with the board of appeals as required herein, the findings, conclusions and dated decision of the hearing officer shall automatically become the findings, conclusions, and final order of the

board of appeals and all objections and exceptions thereto shall be deemed waived.

(8) Service on Parties. Any petition, brief, or other matter permitted or required herein to be filed by any party with the board of appeals shall be, at the time of such filing with the board of appeals also furnished to all other parties to the proceeding by any method authorized by Trial Rule 4 of the Indiana rules of procedure; the preferable method of service on parties is by registered or certified mail with a return receipt.

(9) Civil Action. Any party aggrieved by the decision of the board of appeals may appeal the decision to civil court.

(i) Annual case review. The parent shall be given adequate notice, in his/her native language, of the date, time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of any correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the annual case review, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants;

(3) a description of the collected data to be discussed; and

(4) notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. The committee shall determine what, if any, additional data are required in order to assess the child's current and continuing needs. The committee shall prepare a written report recommending one of the following:

(1) retention in the program;

(2) transfer to a different level (primary, intermediate, etc.) or intensity (instructional resource service, full-time special class, etc.) of special education programming;

(3) transfer to a regular school program; or

(4) transfer to an appropriate public resource.

Recommendations (2), (3), and (4) constitute a proposed change in the child's educational placement. Accompanying notice to the parent of the change, in respect to recommendations (2), (3), or (4), there shall be written notice of parental rights as outlined in subdivisions (f)(1) to (f)(12), case conference committee meeting.

(j) Suspension or explusion [sic.]. Any handicapped child enrolled in special education programs or classes may be denied the right to attend school or to take part in any school function through suspension, expulsion or exclusion procedures as outlined in the statute regarding due process in student discipline, IC 20-8.1-5, provided however, that due process procedures shall also be observed in denying transportation and other related services. The expulsion or exclusion of any handicapped child in special education programs or classes shall be considered a change in the child's placement and shall be preceded by a meeting of the case conference committee. The case conference committee shall meet as soon after the misconduct as possible. The parent shall be given adequate notice, in his/her native language, of the date,

time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the case conference committee, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants and notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing; and

(3) a listing of the collected data to be discussed.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. The case conference committee meeting shall be chaired by the director of special education or his/her designee. Pending the outcome of the case conference committee meeting and further expulsion or exclusion proceedings, the child shall not be removed from school unless he/she presents a danger to himself/herself or others. If such a danger exists and the child is removed from school, the child shall be given homebound instruction. If the child's presence is a substantial disruption, he/she may be placed in a more restrictive environment within the school. Both homebound instruction and more restrictive placement can be initiated by the building principal on an emergency basis at the time of the misconduct, but

must be approved or disapproved by the case conference committee when it convenes to consider the cause of the misconduct. Disapproval will result in a return of the child to the placement he/she had at the time of the misconduct. Emergency homebound instruction or placement in a more restrictive environment within the school may not exceed a period of forty-five (45) calendar days, at which time the case conference committee must reconvene to consider the extension of such placement pending the outcome of the proceedings. The purpose of the case conference committee meeting shall be to determine whether or not there is a causal relationship between the child's misconduct and his/her handicap. If a causual [sic.] relationship is determined by the case conference committee, the child may not be expelled or excluded, and the committee shall examine the child's current individualized education program in order to determine whether a change in that program might help prevent a reoccurrence of the misconduct. The procedures outlined in subsection (f), shall be followed in deciding upon and accomplishing such change in placement. If the case conference committee finds no causal relationship between the child's misconduct and his/her handicap, the committee shall make a written report of its findings to the superintendent of the corporation in which the child is in attendance for his/her final determination. The superintendent shall send a final report to the parent. The report to the parent shall be accompanied by a written notice informing the parent of the right to object to the case conference committee's findings before an independent hearing officer, the manner in which to request such a hearing, the right to obtain an independent educational evaluation and all other rights contained in subsections (f) and (g) which are pertinent to the hearing. Upon receipt of the report, the parent may exercise one of the following options:

(1) Request, within ten (10) calendar days, the appointment of an independent hearing officer to review the report of

the case conference committee. This request and the hearing shall follow the procedures outlined in subsection (g).

(2) Take no action regarding the case conference committee's report and thereby waive the right to object to it.

All arrangements for an expulsion or exclusion hearing may go forward immediately following the superintendent's release to the school of the case conference committee's final report. However, the filing of a request for the appointment of an independent hearing officer shall stay the expulsion or exclusion hearing until all proceedings under 510 IAC 7-1 [511 IAC 7-1] are completed.

(State Board of Education; Rule S-1, Sec III; filed Aug 25, 1978, 4:40 pm: 1 IR 681; filed Jun 29, 1981, 4:30 pm: 4 IR 1476, eff Sep 1, 1981; filed May 10, 1984, 10:30 am: 7 IR 1507, eff Mar 15, 1984) NOTE: IC 4-22-2-5 suspends the effectiveness of a rule document for thirty (30) days after filing with the secretary of state. LSA Document #83-114 was filed with the secretary of state May 10, 1984. NOTE: Transferred from the commission on general education (510 IAC 7-1-3) to the state board of education (511 IAC 7-1-3) by PL. 20-1984, SECTION 206, effective July 1, 1984.

Cited in: 511 IAC 1-6-4; 511 IAC 7-1-4; 511 IAC 7-2-1; 511 IAC 7-2-3.